

**THIS OPINION WAS NOT WRITTEN FOR PUBLICATION**

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 27

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* ROBERT L. POPP, FRANK S. GLAUG, JULIA M. LUBEN,  
SHIRLEE A. WEBER and DAVID A. KUEN

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Appeal No. 97-0937  
Application No. 08/054,508<sup>1</sup>

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ON BRIEF

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Before CALVERT, ABRAMS and FRANKFORT, *Administrative Patent Judges*.

ABRAMS, *Administrative Patent Judge*.

**DECISION ON APPEAL**

This is an appeal from the decision of the examiner finally rejecting claims 46-50. Claims 1-45 have been canceled. No claims have been allowed.

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<sup>1</sup>Application for patent filed April 26, 1993.

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The appellants' invention is directed to a disposable absorbent article. The subject matter before us on appeal is illustrated by reference to claim 46, a copy of which appears in an appendix to the appellants' Brief.

#### **THE REFERENCES**

The references relied upon by the examiner to support the final rejection are:

Repke et al. (Repke) 1980	4,205,679	Jun. 3,
Boland et al. (Boland) 1988	4,747,846	May 31,
Kielpikowski et al. 30, 1989 (Kielpikowski)	4,834,738	May
Enloe et al. (Enloe) 1989	4,846,825	Jul. 11,
Freeland et al. (Freeland) 1991	5,032,120	Jul. 16,
Igaue et al. (Igaue) 1992	5,114,420	May 19,

#### **THE REJECTIONS**

Claims 46-50 stand rejected under 35 U.S.C. § 103 as being unpatentable over Enloe in view of Igaue and Freeland.

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Claims 46-50 also stand rejected under 35 U.S.C. § 103 as being unpatentable over Enloe in view of Igaue, Repke, Boland, Kielpikowski and Freeland.

The rejections are explained in the Examiner's Answer.<sup>2</sup>

The opposing viewpoints of the appellants are set forth in the Brief.

### **OPINION**

After consideration of the positions and arguments presented by both the examiner and the appellant, we have concluded that neither of the rejections should be sustained. Our reasons for arriving at this conclusion follow.

Both of the rejections are under 35 U.S.C. § 103. The test for obviousness is what the combined teachings of the

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<sup>2</sup>The examiner saw fit in the Answer to explain the rejections by referring only to pages and lines from three previous office actions. Two of those (Papers 21 and 14) used the same format, and only when one reached Paper No. 10, the first office action, were the rejections actually explained. This is a flagrant violation of the instructions regarding reference to previous papers in Examiner's Answers (see MPEP §1208). More importantly, however, like the appellants, we found it very difficult to effectively and efficiently understand and evaluate the rejections, which is the very reason for the rule.

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prior art would have suggested to one of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981).

Independent claim 46 is directed to a disposable absorbent article. Among the features recited in the claim is  
a pair of containment flaps operatively joined at their respective end portions in a transversely foreshortened state to said waste containment assembly.

Enloe, the primary reference cited against the claims, also discloses a disposable absorbent article comprising a pair of containment flaps (30 & 32). However, there is a difference between the structure of Enloe and that required by claim 46. The claim specifies that the containment flaps be "in a transversely foreshortened state" at their end portions. As explained in the specification, this means that at their end portions the flaps (which already include a fold at distal end 65 in which elastic 67 is positioned) are folded over upon themselves, that is, shortened, so that the distal edges are closer to the proximal edges (pages 15 and 16; compare Figures 6A and 6B). According to the appellants, this results in the center portions of the containment flaps being more upright

(Figures 5 and 7), so that they do not tend to fold downwardly as the article is donned, as was the case in the prior art (Figure 4). In the Enloe article, the containment flaps are not "in a transversely foreshortened state" in accordance with the meaning established for this terminology in the specification, as can be seen in Figure 1 of the Enloe drawings.

The examiner apparently looks to Igaue for the above-described feature. Igaue's disposable article comprises a waste containment section 11 which is flanked by a pair of upstanding flaps 17 (Figures 2 and 4). The upper edge of each flap has a fold over its entire length to accommodate elastic bands 22 (Figure 4). From our perspective, the Igaue flaps also are not "in a transversely foreshortened state," in accordance with the interpretation that is established in the appellants' specification.

Freeland has been applied by the examiner for its teaching of utilizing flap elastic having the specifications recited in claim 46. Be that as it may, this reference fails to overcome the deficiency in the basic combination.

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Since the teachings of the three references fail to establish a *prima facie* case of obviousness with regard to the subject matter of claim 46, we will not sustain this rejection of independent claim 46 or of claims 47-50, which depend therefrom.

The second rejection of claims 46-50 also utilizes Enloe, Igaue and Freeland as evidence that the basic features recited in claim 46 would have been obvious, adding an additional three references with regard to the subject of the interchangeability between two and three dimensional absorbent garments. The added references also fail to overcome the problem discussed above with the basic combination, and therefore this rejection will not be sustained.

The decision of the examiner is reversed.

**REVERSED**

IAN A. CALVERT )  
Administrative Patent Judge)

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PATENT	NEAL E. ABRAMS	) BOARD OF
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	CHARLES E. FRANKFORT	)
	Administrative Patent Judge)	

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